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No. 853

In the Supreme Court of the United States

OCTOBER TERM, 1970

LEWES DAIRY, INC., ET AL., PETITIONERS

v.

CLIFFORD M. HARDIN, SECRETARY OF AGRICULTURE

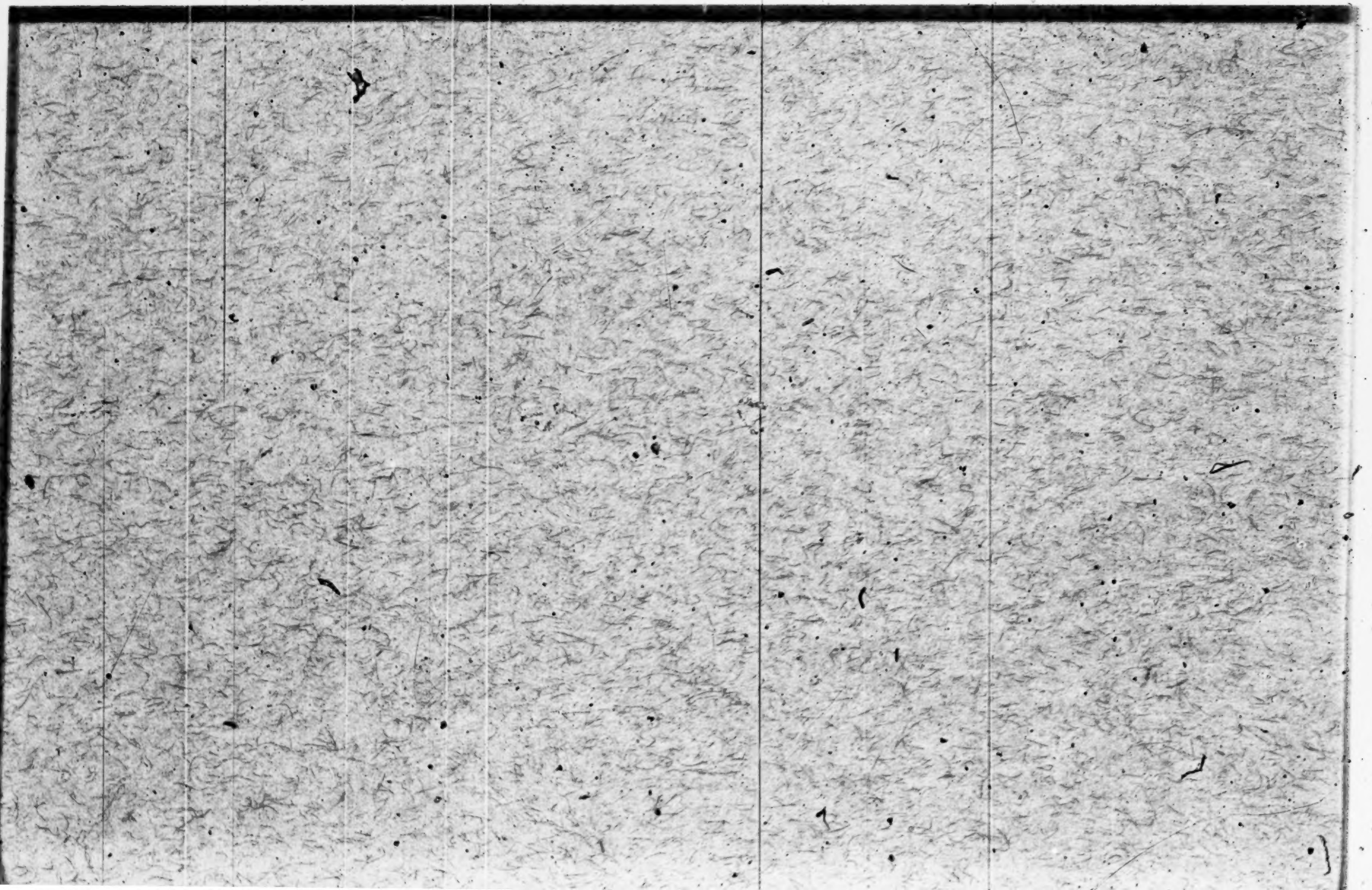
ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The opinions of the court of appeals (Pet. App. 44-47) and the district court (Pet. App. 25-32) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 1, 1970, and a petition for rehearing was denied on July 27, 1970. The petition for a writ of certiorari was filed on September 4, 1970. The juris-

diction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the court of appeals correctly concluded that its mandate in *Lewes Dairy, Inc., et al.* v. *Freeman*, 401 F.2d 308 (Pet. App. 1-23) certiorari denied, 394 U.S. 929, constituted a "final decision" which precluded the district court from remanding the case to the Secretary of Agriculture for further administrative proceedings.

STATEMENT

Petitioner Lewes Dairy [1] is a milk handler located in Lewes, Delaware, an area not regulated by a milk marketing order. On February 1, 1960, the predecessor to Milk Marketing Order No. 16 (7 CFR Part 1016) took effect. Lewes became a fully regulated handler by virtue of its substantial sales of fluid milk in the Upper Chesapeake Bay Marketing Area, the area covered by the Order (Pet. App. 2, n.1). Lewes filed an administrative petition under 7 U.S.C. 608c(15)(A) objecting to full regulation under the Order (Pet. App. 2, n.3).[2]

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[1] Hollybrook Dairy, a defunct partnership, was also a plaintiff in this action. Its interests have been represented by Lewes since it went out of business prior to 1964 (Pet. App. 2, n. 2). Petitioners will be referred to collectively as Lewes.

[2] The history of this lengthy litigation is set out in more detail in two earlier opinions of the court of appeals, *United States* v. *Lewes Dairy, Inc.*, 337 F. 2d 827, and *Lewes Dairy, Inc., et al.* v. *Freeman*, *supra*.

After an administrative determination that the marketing order provisions were valid, Lewes filed an action for review in the district court pursuant to 7 U.S.C. 608c(15)(B). That court held that full regulation of Lewes' milk on the basis of its Maryland sales constituted a "trade barrier," prohibited by 7 U.S.C. 608c(5)(G) as construed in *Lehigh Valley Cooperative Farmers, Inc.* v. *United States*, 370 U.S. 76 (Pet. App. 3). Since *Lehigh Valley* was decided after the conclusion of these administrative proceedings and the "trade barrier" argument had not been made at that level, the court of appeals, at the Secretary's suggestion, reversed and remanded the case to the Department of Agriculture for a factual determination on the "trade barrier" issue (*ibid.*). Lewes' petition for a writ of certiorari was denied. 379 U.S. 1000.

Before the Secretary on remand, Lewes called only one witness and produced no cost data to buttress its assertion that, as a result of full regulation under the Order, it was being required to pay more for its milk than the unregulated Delaware handlers with which it competed (Pet. App. 11). The Judicial Officer (acting for the Secretary), again upheld the challenged Order as applied to Lewes (Pet. App. 3). The district court reversed, this time on the ground that the Secretary's decision was not supported by substantial evidence. *Lewes Dairy, Inc.* v. *Freeman*, 260 F. Supp. 921 (D. Del.).

The Secretary appealed, asserting that his decision that Lewes had failed to establish the factual predicate to its trade barrier argument was correct. In re-

sponse, Lewes contended, *inter alia*, that it had been misled at the administrative hearing into believing that the kind of evidence it had submitted was sufficient to establish a *prima facie* case of competitive disadvantage.

The court of appeals reversed, noting that "[i]t was for the very purpose of affording Lewes an opportunity to adduce evidence to demonstrate the trade barrier effect of the Marketing Order that this court remanded the matter for further administrative procedure" (Pet. App. 11). It held "valid the action of the Secretary in imposing full regulation upon Lewes under" the challenged Order (Pet. App. 23). Lewes then filed a petition for rehearing in which it renewed its claim that it had been misled at the administrative level and asserted that the court of appeals, by requiring evidence that Lewes paid more for its milk than its unregulated Delaware competitors, had unfairly imposed an evidentiary burden which it had had no reason to anticipate at the time of the administrative proceedings.

After the petition for rehearing was denied, Lewes filed a petition for certiorari in which it again claimed that it had been treated unfairly. This Court denied certiorari. 394 U.S. 929. Although the court of appeals had reversed without remanding for further proceedings (Pet. App. 23), Lewes then filed a motion in the district court in which it requested that court to remand the case to the Secretary to enable it to furnish evidence of the kind which the court of appeals had held it should have submitted in the second administrative proceeding (Pet. App. 25). In requesting this relief, Lewes relied upon essentially the same

contentions which it had unsuccessfully urged both in the court of appeals and in this Court on its petition for certiorari. The district court granted the motion to remand on the ground that "essential justice would be better served" thereby (Pet. App. 32).

The Secretary filed a petition for a writ of mandamus in the court of appeals, asserting that the district court's remand order was contrary to the court of appeals' mandate (Pet. App. 35). The petition came before the same panel that had rendered the earlier court of appeals decision (Pet. App. 1, 44). The court granted the petition, stating that the district court's remand order was "inconsistent with the opinion of this court in *Lewes Dairy, Inc., et al.* v. *Freeman*, 401 F.2d 308 (1968), and the terms of the mandate based thereon * * * and was beyond the Judge's province * * *" (Pet. App. 45). The court of appeals ordered the district court to enter judgment for the Secretary and to release over $400,000 in escrowed monies which had accumulated during the almost ten years this litigation has been in progress (Pet. App. 46). These monies, which Lewes had been obligated to pay under the challenged marketing order, were held in escrow pending final resolution of the validity of the original action of the Secretary seeking to enforce the Order against Lewes.[3] Lewes' petition for a rehearing *en banc* was denied.

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[3] The pendency of a Section 608c(15) proceeding does not relieve the handler of the obligation of complying with the marketing order provisions unless and until those provisions are declared invalid. 7 U.S.C. 608c(15)(B).

ARGUMENT

There was but one question before the court of appeals when it granted the Secretary's mandamus petition—whether the court's mandate in *Lewes Dairy, Inc., et al.* v. *Freeman*, 401 F.2d 308, was a "final decision" concluding this protracted litigation. The answer, given by the same panel of the court that had rendered the earlier decision, was that it was.

The question whether a court of appeals has correctly construed its own mandate is inappropriate for review before this Court. But Lewes does not seriously contend that the court of appeals construed its mandate incorrectly, or that this Court should decide that issue. Its real quarrel is with the mandate itself. Its remedy, however, for any error by the court of appeals in reversing the district court's second order without remanding for further administrative proceedings, was by petition for rehearing in the court of appeals and, if that was denied, by petition for certiorari in this Court. Lewes filed such petitions, arguing essentially as it does now, that the court of appeals' requirement of specific evidence "would constitute a retroactive change in the ground rules upon which the administrative hearing itself proceeded." (Pet. 17, n.13 in No. 924, O.T. 1968). When the petition for certiorari was denied, the issue was closed; it cannot be resurrected now.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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